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No. 73

In the Supreme Court of the United States

OCTOBER TERM, 1957

FEDERAL MARITIME BOARD, PETITIONER

v.

ISBRANDTSEN COMPANY, INC., UNITED STATES OF AMERICA, AND SECRETARY OF AGRICULTURE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER FEDERAL MARITIME BOARD

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The briefs of the Department of Justice and of Isbrandtsen Company, Inc. (cited herein as "D. J. Br." and "Isb. Br.") together aggregate some 223 pages, and raise issues not embraced within our petition or opening brief. We believe that reply is necessary. Our reply is organized, first, under the heads of our main brief, and then deals with the additional issues in subsequent sections.

STATEMENT OF THE CASE

The Court would not, we believe, be greatly assisted by an encyclopedic enumeration of what we consider to be the many errors and exaggerations in respondent Isbrandtsen's statement (Isb. Br. 5–61). Accurate statements are found in the brief of the Depart-

ment of Justice as well as in that of the Conference and in our own main brief. We shall, therefore, discuss only two factual issues, one of which is central and the other of which is important to Isbrandtsen's argument.

1. *The "Elimination" of the Independent.* Isbrandtsen throughout its brief ties its case to the assertion that inauguration of the dual rate system by the petitioner conference is designed to and will eliminate the independent carrier (Isb. Br. 3, 15, 25–26, 31–32, 42, 62–63, 75–77, 85–86, 158, 161). The Department of Justice apparently does not join in this charge (see Br. 3, 47–48), although at places its generalized arguments seem to accept it as true (see Br. 30–31, 39, 46). The contention is neither open to Isbrandtsen nor correct.

The Board's two decisions in the trades from Japan to the United States show the discriminating care with which it has considered this issue. In *Trans-Pacific Freight Conference of Japan*, No. 743 (Mar. 5, 1956), the Board refused to approve a contract rate system because it found that the dual rate system would be expected to reduce the independent carriage of Isbrandtsen to 2–5% of the trade, leaving the conference with a virtual monopoly without corresponding benefit to the trade (p. 22).[1] In the present case,

[1] Both Isbrandtsen (Br. 78) and the Department of Justice (Br. 46) quote at length from a passage in the 1951 brief of counsel for the Board in *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883 (S. D. N. Y.). Whatever the original accuracy or the authority of that passage, which indicates that monopoly is the goal of a dual rate system, it has none after the *Trans-Pacific* decision.

on the other hand, the Board stated, "We find it probable that Isbrandtsen will retain 10 percent or more of the cargo moving in the trade" (R. 62, 34). As Isbrandtsen furnished 10% of the 1952 sailings and 7% in the first half of 1953 (R. 27), the Board considered this "would be at least an equitable share of the trade" (R. 62).

By prehearing stipulation and order, the issues were reduced to five and the only one to which the facts could be relevant was confined to decision "on the basis of the facts existing in the administrative record as found by the Board itself" (R. 232–234). Isbrandtsen itself recognizes that it so stipulated to "limit the facts, for purposes of review" (Isb. Br. 5). Isbrandtsen cannot, therefore, base its case upon the view that the Board's finding must be discarded in favor of Isbrandtsen's repetitive and wholly unsupported assertions that it will be eliminated from the trade by the Board's decision.

The "facts" which an administrative agency is authorized to find must of course include informed estimates as to future developments as well as recitals of historical occurrences. E. g., *Hudson & Manhattan R. Co.* v. *United States,* 313 U. S. 98, 99; *Railroad Commission* v. *Oil Co.,* 310 U. S. 573, 581–583; *American Power Co.* v. *S. E. C.,* 329 U. S. 90, 112, 118. And, certainly, when this Court returned the dual-rate cases to the Board for the exercise of its "expert and technical knowledge * * * upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries" (*U. S.*

Navigation Co. v. *Cunard Steamship Co.*, 284 U. S. 474, 485; *Far East Conf.* v. *United States*, 342 U. S. 570, 573) it did not expect the reviewing court to jettison the administrative judgment. This is most emphatically plain here, where the administrative judgment is attacked only by general epithet.

It is finally to be noted that "Isbrandtsen has for a number of years continued its operation on one or more other trade routes against conference lines where a dual-rate system is in force with a differential as great or greater than the 10 per cent here involved." *Contract Rates—North Atlantic Cont'l. Frt. Conf.*, 4 F. M. B. 355, 360, 374 (1954).[2]

2. *The Isbrandtsen Principle.* Isbrandtsen states that it does not oppose the uniform rates of a conference system (Isb. Br. 71). It also states, in our view quite incorrectly, that it opposes the dual rate system simply because it is attached to its "right to be free from such entangling alliances with other carriers—overwhelmingly foreign lines"[3] (e. g. Isb. Br. 16).

The Board in its decisions has in no way disparaged the abstract desirability of Isbrandtsen's "right to be free." It has, however, repeatedly found that Isbrandtsen's competitive practices are destructive of rate stability and regularity of service. Isbrandtsen as a general rule maintains its rates 10% below the

[2] To be precise, the Board referred to Isbrandtsen-Moller, respondent's prewar predecessor, whose practices were the same as those of Isbrandtsen here involved. 4 F. M. B. at 360; *Section 19 Investigation, 1935*, 1 U. S. S. B. B. 470.

[3] It should be noted that Isbrandtsen, in other trades, itself operates foreign-flag vessels (R. 25).

conference tariff rate, whatever that rate may be (R. 29). In result, it was able in this trade to carry about three times as much cargo per voyage as the conference lines (R. 27).[4] The uniform conference rate is, therefore, a protective "umbrella" under which Isbrandtsen can attract cargo free of rate competition. *Secretary of Agriculture* v. *North Atlantic Cont'l. Frt. Conf.*, No. 725 (pp. 18–19); *Marx, International Shipping Cartels*, (1953), pp. 189, 196. The result is the strongest sort of pressure upon the conference members to open their rates in order to meet the independent's competition, and once this step is taken to demoralize the trade by rate-wars. (R. 29–32); *Section 19 Investigation, 1935*, 1 U. S. S. B. 470; *Cargo to Adriatic*, 2 U. S. M. C. 342 (1940). Once the rates are opened, and the trade becomes demoralized, Isbrandtsen is likely as it was here to be driven out almost completely (R. 31). The Isbrandtsen rate practices, in short, are highly beneficial to Isbrandtsen so long as there are uniform conference rates and a continued willingness by the conference carriers to maintain those rates; once the rate structure becomes competitive, as it must when Isbrandt-

[4] Isbrandtsen (though not the Department of Justice) insists that Japan loadings are unimportant, since the conference lines load more in the Philippines and Hong Kong (Isb. Br. 29–30, 76. If it were significant, it would also have to be remembered that Isbrandtsen loads in Pakistan, India, Ceylon, Indonesia and Malaya (where most of the conference lines do not load) and discharges in California (where a number of conference lines do not). But it is not significant, since *all* lines sail from Japan with substantial empty space (R. 28). This means that each line, Isbrandtsen and conference alike, is seeking as much Japanese cargo as it can get without regard to prior loadings.

sen's advantage under closed rates becomes too great, there is abundant history to show that a rate-war is inevitable, to the distress of the shippers as well as the carriers. *Section 19 Investigation, supra.*[5]

Isbrandtsen's practice of making a differential discount from the conference rate had no effect, prior to the rate war, in lowering the freight rate, or in preventing rate increases, since Isbrandtsen promptly moved in step with the conference change (R. 68). Nor, short of a breakdown of conference rate-making, can the Isbrandtsen practice loosen or modify the conference "monopoly." The uniform rate of the conference lines is the essential ingredient of Isbrandtsen's success. It obtains more cargo, and thereby reduces its costs per ton, in consequence of the conference rate agreement. When rates are forced to become competitive, Isbrandtsen is likely to be driven from the trade. Isbrandtsen, then, is not a determined gladiator against uniform conference rates, but is instead their major beneficiary.

I. THE HOLDING BELOW CONTRADICTS THE TEXT OF THE STATUTE

The respondents insist that Section 14, Third, makes the dual rate system unlawful because the car-

[5] In *Section 19 Investigation* the Shipping Board Bureau, after study of 6 demoralized trades (3 by Isbrandtsen-Moller), and after hearing the complaints of "a long line of shipper witnesses," recommended an order requiring adherence to filed export tariffs by the independent as well as the conference lines, to the end that *ad hoc* rate-cutting be terminated. The Secretary, doubtful as to his powers, simply required that the ex-

rier would thereby "retaliate against any shipper by * * * resort to other discriminating * * * methods, because such shipper has patronized any other carrier" (Isb. Br. 95–106; D. J. Br. 20–34).

We have shown in our main brief that "other" must here as so often be read in the light of the rule of *ejusdem generis* and to include only those "discriminating methods" which are similar to "refusing, or threatening to refuse, space accommodations when such are available" (F. M. B. Br. 19–24).[6] In that view of Section 14, Third, it is immaterial whether a dual rate system could ever be called "retaliatory."

If, however, Section 14, Third, were stretched to cover rate-making, then it would become important to determine whether the dual rate system can in any sense be considered "retaliatory." Isbrandtsen considers it "absurd" to consult the dictionary to determine what the Congress meant by "retaliate" (Br. 100–102). We, to the contrary, consider that the meanings offered in the dictionaries mark at least the natural outer boundaries of a statutory term. Every applicable definition we have found carries into the word "retaliate" the thought of revenge in like kind,

port rates be filed. His order was upheld on review. *Isbrandtsen-Moller Co.* v. *U. S.*, 300 U. S. 139.

[6] We find corroboration for this application of the rule in that: (a) The term "methods" is not, either in the Shipping Act or ordinarily, used to describe rates. (b) Throughout the Alexander Report we have found not one instance where "retaliate" was applied to rate practices. Where the context is sufficiently specific to show the sense, it, along with similar words such as "penalize" or "coerce," was directed to the denial of space or service, (1/14, 23–24, 30–31; 33, 35–36, 56, 87; 2/782–3; 3/113–14; 4/164–67, 288, 417), or in one instance, to a penalty rate (3/114).

of returning evil for evil or injury for injury.[7] Under a tolerably loose reading of the term, to deny service to a shipper who has used another line is "retaliation." To exchange a reduction of the tariff rate for a promise of exclusive patronage cannot under any normal usage of the term be said to be returning evil for evil nor to be an act of vengeance. No more is it "retaliatory" to hold the shipper to his promise on pain of reasonable damages.[8]

The Department of Justice simply ignores the dictionary and common usage, and asserts without explanation that it would be hard to imagine a plainer case of retaliation (Br. 22–23). It then proceeds to read "retaliate" as the equivalent of "coerce" or "p[illegible]lize" (Br. 23, 32, 33). This revision of the statutory word leads immediately into the insoluble semantic problem of whether the contract shipper is "induced" by the hope of the lower rate or "coerced" by the prospect of the higher rate. Almost every eco-

[7] See *Funk & Wagnalls New Practical Standard Dictionary* (1955): "to give like for like; especially, to repay evil with evil"; *Webster's New International Dictionary* (1957): "to return the like for; to repay or requite in kind, as an injury; to put or inflict in return (upon)"; *Wyld, The Universal Dictionary* (1952): "to pay back in kind; to reply to an action or utterance by a similar one; usually said of action taken, or words uttered, in reply to a hostile or unfriendly act or speech;" *Winston Dictionary* (1953): "to give like for like, especially evil for evil; revenge; requital;" *New Century Dictionary* (1956): "to return like for like, esp. (now usually) evil for evil: as, to retaliate for an injury"; *Oxford English Dictionary* (1933): "to make return or requital * * * of injury, insult, etc."

[8] As the Conference brief shows (pp. 48–49) the liquidated damage of 50% of freight is *less* than that recoverable in the absence of such a provision. The Board has invalidated damage clauses which were excessive. *Pacific Coast/European Conference*, 3 U. S. M. C. 11 (1940).

nomic transaction can be described, according to taste, as one of inducement or of coercion.[9] Quite apart from dual rates, any shipper is inevitably "coerced" by his necessities or "induced" by his opportunities into paying the freight rate demanded by the carrier as the price of carriage. The leap from "retaliation" to "coercion," therefore, at once places the controversy in a posture where it can be "decided" only by question-begging choice among two equally applicable verbs.

II. THE LEGISLATIVE HISTORY OF THE ACT DEMONSTRATES THAT THE CONGRESS DID NOT INTEND TO PROHIBIT THE DUAL RATE SYSTEM

The Departments of Justice and Agriculture and the Federal Maritime Board, the Government agencies before the Court, have considered that the Court might be assisted by a coherent collection of the relevant material from the Alexander Report. They have, accordingly, submitted a Joint Appendix to their respective briefs containing a selection of the material from which they draw their opposing conclusions.

We believe the Court may be spared much effort to weigh the force of opposing arguments if it were simply to read, even cursorily, the proceedings of the Alexander Committee which have been gathered into the Joint Appendix. The following reply to the briefs of the respondents is precautionary only, to

[9] See *Hale, Coercion and Distribution*, 38 Pol. Sci. Q. 471 (1923); *Cohen, Property and Sovereignty*, 13 Corn. L. Q. 8 (1927); in *United States* v. *Butler*, 297 U. S. 1, compare Justice Roberts' statement at pp. 70–71 with that of Justice Stone at p. 81; cf. *Holmes, The Path of the Law* (Collected Legal Papers, pp. 173–174).

suggest the points which should be noted and where possible to afford precise summaries instead of general impressions.

In our main brief we showed that the Alexander Committee: (a) precisely described and precisely condemned deferred rebates, fighting ships and denial of space, while it recognized and did *not* condemn dual rate contracts (Br. 35–42); (b) was thoroughly aware of dual rate contracts substantially identical with those at bar (Br. 42–50); (c) had clear notice that the contract rate system would necessarily replace the outlawed deferred rebate (Br. 50–54); and (d) was concerned with retaliation only insofar as it involved space and shipping service, not rates (Br. 55–62). The respondents advance a variety of reasons why these apparently compelling reasons must be ignored. None is valid.

1. *The Importance of the Alexander Report.* Isbrandtsen, but not the Department of Justice, urges that the Alexander Report was a mere interim document which should be ignored because the actual bills came later, with their own reports (Isb. Br. 109–111, 122–123). The facts are these:

Chairman Alexander after submission of his Committee report, introduced H. R. 17328 into the 63d Congress, 2d Session, but too late to receive action. An identical bill, H. R. 450, was introduced by him into the 64th Cong., 1st Sess. H. R. 14377, 64th Cong., 1st Sess., was a somewhat modified version; hearings were held on this bill but it was not reported out. In the meantime, owing to the European war, the Congress had become greatly concerned about the short-

age of merchant tonnage. H. R. 10500 had been introduced by Chairman Alexander to create a Shipping Board with the responsibility of developing a merchant fleet; it had two regulatory sections calling for licensing water carriers and prescribing their rates. H. R. 15455 was introduced after hearings on H. R. 10500; it was based upon the fleet development provisions of H. R. 10500 but with the regulatory provisions of H. R. 14377 (i. e., the Alexander Committee recommendation) substituted for the licensing and rate regulation provisions. See Mr. Alexander, 53 Cong. Rec. 8077–78.

H. R. 15455 became the Shipping Act, 1916. Its regulatory sections were explained by both the House and the Senate Committees by verbatim quotations of the recommendations of the Alexander Committee report, without any independent discussion of the regulatory provisions by either current committee. H. Rept. No. 659 (pp. 27–32) and S. Rept. No. 689 (pp. 7–12), 64th Cong., 1st Sess. The floor debates in both houses were extensive but were directed almost exclusively to the fleet development provisions; the regulatory features received only scattered and desultory attention (53 Cong. Rec. 8077–78, 8080, 8087, 8095, 8105, 8354, 12,345, 12,449–12,450).

Thus, while the Shipping Act followed nearly two years after the Alexander Report, that report is the authoritative and, indeed, almost the exclusive source of the legislative history of the sections here involved.

2. *The Dual Rate Contracts.* The respondents accept (Isb. Br. 60–61, 118–121; D. J. Br. 37–41) with understandable enthusiasm the inexplicable view of

Judge Washington below that the Alexander Committee was concerned only with requirements contracts of a quite different nature than those at bar (R. 247). We believe a detailed summary rather than further argument is called for.

While we do not find close precision possible, there were by our count about 70 examples of dual rate contracts or systems exhibited or described, in varying detail, to the Alexander Committee. They show the following characteristics:

a. *Trades.* They were drawn from the following trades [references to volume/page]:

1. New York—River Plate	40	[1/97–98, 120; 226, 246–263, 289, 390; 4/172–4].
2. New York—Brazil	8	[1/155, 202–203, 206, 213, 246–48; 4/160].
3. New York—South Africa	4	[1/277–78, 286–88; 4/96–97].
4. New York—Far East	2	[1/390–91, 446–47; 4/116].
5. New York—Chile	2	[1/487, 490–92; 4/186–87].
6. New York—Europe	2	[1/615; 2/818–19].
7. New York—Indonesia	1	[1/341–2].
8. New York—Puerto Rico	2	[1/632–34].
9. New York—Cuba	1	[1/653–54].
10. India—U. S. Pacific	1	[2/879].
11. London—New York	1	[2/1252].
12. Netherlands—New York	1	[3/90].
13. Egypt—New York	1	[3/113–14].
14. Egypt—U. K.	1	[3/302; 4/102].
15. General or unstated	3	[1/253, 460–61; 2/767–69].
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b. *Carriers.* The contracts were offered on behalf of—

1. All conference lines	14	[1/247–249, 254, 261–63, 287–88; 2/768; 879; 3/90, 118–14; 4/96–97].
2. A single line, to go by its vessels or, frequently, by others designated by it, with an understanding that shipments by other conference lines were no breach (1/226, 227; 4/172–73).	33	[1/97–98, 120, 250–53, 255–61, 263, 289–90].

3. A single line only	3	[1/490–92, 653–4; 2/1252; 4/206].
4. Single line if less than 3 months and if quantity small, otherwise all conference lines.	1	[1/155, 202–3, 206].
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[1] The Department of Justice finds only 3 of the 43 contracts introduced by Mr. Gerhard to be joint contracts for the conference (Br. 38). In fact: (a) Mr. Gerhard introduced 38 not 43 contracts (the Department of Justice counted 5 confirming and duplicating letters; 1/246–47, 249–50, 253, 260–61, as contracts). (b) 8 not 3 of the Gerhard contracts called for shipment by any of the named conference lines (1/247, 247, 248, 254; 261, 262, 262, 262). (c) There were in addition 6 other joint contracts introduced by other witnesses, cited above. (d) "As a matter of fact," even when only one line contracts, "each contractor is allowed to ship by any of the other lines working in harmony with us" (1/277).

c. *Term.* The contracts had the following periods during which they were to be effective—

1. 4 months	1	[1/249].
2. 4–16 months	2	[1/289–90, 616–17].
3. 5 months	3	[1/257, 260–61].
4. 6 months	2	[1/257, 262].
5. 7 months	2	[1/249, 259].
6. 8 months	5	[1/249, 253, 256, 258–60]
7. 9 months	2	[1/260–61].
8. 10 months	2	[1/120; 261].
9. 11 months	5	[1/250–251, 259].
10. 1 year	18	[1/97–98, 252–258, 262, 288, 446–7; 460–1, 632–34, 654; 2/768; 4/102, 116, 160].
11. 1 year subject to 30 days notice	1	[1/246–47].
12. "Season or year"	1	[3/90].
13. 2 years	1	[3/113–14].
14. 1–3 years	1	[1/413; 4/236].
15. Indefinite, subject to change without notice.	1	[1/487, 490–92; 4/186–87]
16. Indefinite, subject to 30 days notice.	3	[1/247–48].
17. Indefinite, subject to 9 months notice after 2 years.	1	[1/287; 4/96].
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d. *Space Obligation.* They imposed the following space obligations upon the contracting carrier or carriers—

1. Provide tonnage on 20 days notice	7	[1/97–98, 120, 250–52, 255, 289–90].
2. Provide space on ample notice	1	[1/248].
3. Provide tonnage on reasonable notice.	1	[1/251].
4. Provide transportation	1	[1/254].
5. One steamer a month	5	[1/258, 287, 633; 4/96–97].
6. Guarantee regular sailings	1	[3/302, 4/102].
7. Line said in discussion to be "liable" or "responsible" to provide space.	2	[1/155, 226–27, 277–78; 4/160, 172].
8. Contracts reproduced; no express obligation.	30	[1/247, 249–251, 253, 255–57, 259–62, 288].
9. Contracts not reproduced, but discussed without mention of responsibility to provide space.	16	[1/341–2, 380–81, 390–91, 413, 446–47, 460–61, 487–92, 615–17, 653–54; 2/767–69, 818–19, 879–80, 975, 1252; 3/90, 113–14; 4/116, 186–87, 236].
	64	

e. *Rate Changes.* The contracts made the following provisions with respect to rate changes during the term of the contract—

1. Rate fixed during term	39	[1/202–3, 213, 247–250, 252–63, 288, 390–91, 460–61, 616; 2/818–19; 3/302; 4/102].
2. Shipper gets benefit of reductions	19	[1/97–98, 249–52, 254, 287–90, 633–34; 4/172–74, 237].
3. As favorable as any shipper	2	[1/253, 287; 4/96–7].
4. Rate increases on 30 days notice	1	[1/246–7; 4/163].
5. Changes without notice	1	[1/490–2].
	62	

f. *Commodities.* The contracts covered—

1. Specific commodities in which shipper is interested with—		
a. No provision as to other freight	25	[1/247, 249, 251, 253, 256–62].
b. Understanding that he has benefit of any rate in any other contract.	3	[1/286–90].
2. Gunny sacks	1	[2/879–80].
3. Cotton	1	[3/113–4, 302; 4/102].
4. All freight	16	[1/97, 248–252, 255–56; 259, 262, 487, 632–34; 3/90; 4/186–87].
	46	

g. *Shippers.* The classes of shippers to whom the contract rates were extended were the following [with

the numeration referring to witnesses rather than contracts]—

1. Offered to all shippers of the commodities involved.	8	[1/202–3, 206, 213, 226–7, 263, 267, 277–8, 390–1, 460–1, 615–17; 3/90, 113–4].
2. Large shippers only	5	[1/341–2, 416–7, 634–36; 653–54; 2/767–69].
3. Single shipper only	1	[1/499–2].

14

The contract at bar contains no significant feature not found in the 1913 contracts examined by the Alexander Committee.[10] The shipper agrees to use only the conference line vessels, as by their terms in 14 of the 1913 contracts and, in practice, in 32 others as well. The term of the contract is indefinite, subject to termination on 3 months' notice (R. 205); it binds the shipper for a shorter period than 46 of the 1913 contracts, of which only 4 with 30 days' notice had a shorter term. The conference carriers here "undertake to maintain a shipping service which shall be adequate to meet the reasonable requirements of the commerce" (R. 204), and "to carry the Shipper's cargoes so far as their regular services are available" (R. 203); this obligation is at least comparable to any in 1913 and is more precise than the majority of the 1913 contracts, which were silent. Here, as in most of the 1913 contracts, the shipper gets the immediate benefit of rate reductions (R. 203). From 2–3 months

[10] None of the 1913 contracts provided liquidated damages, although one was said to be enforced by the refusal of space to violators [3/113–14]. The Board held in this case that it had been presented with no evidence to show whether the 50% liquidated damages amounted to a penalty (R. 67). See the Conference brief, pp. 46–49.

notice is required for rate increases (R. 203) (along with power in the shipper to terminate on 3 months' notice); while most of the 1913 contracts had rates fixed during the term, at least 2 permitted increase on shorter notice. The present contract covers all of the shippers' freight (R. 203); many of the 1913 contracts were tailored to each customer and listed only the specific commodities which he would ship, but 16 covered all freight while another 3 would on request include any other contract commodity. The contract at bar, like most but by no means all of the 1913 contracts, is open to large and small shippers alike.

The Alexander Committee was not oblivious of all of the evidence of a contract rate system which was placed before it. To the contrary they showed a consistent and lively interest. The Committee Chairman, or occasionally another member, made a practice of inquiring of his own motion about the sort of shipper contracts employed by the line or in the trade. He or another member did so 11 times.[11] Almost invariably, once the existence of a contract system was established, he would inquire of the witness whether the contract rates were available only to the large shipper or to all. He or another member did so 18 times.[12]

The Department of Justice seeks to put the 1913 contracts aside on several wholly unsupported grounds. First, it says that in 1913 the contracts

[11] 1/273–74, 277–78, 390–91, 446–47, 460–461, 487, 490–91, 616–17, 632, 653–4, 1255.

[12] 1/107–8, 203, 263–4, 267, 278, 341–2, 390–91, 446–47, 460–61, 487, 490–91, 616–17, 634–36, 653–54; 2/767–9, 964/5, 1026, 1255.

were intended to secure business, and not to discourage non-conference competition (Br. 40). None of us can in 1957 read the minds of the 1913 shipping men, but the understanding of the Alexander Committee—which is the only understanding in issue—is entirely clear. It described these various forms of exclusive patronage contracts under the heading "*Meeting the competition of lines outside the conference*" (4 Alex. Rept. 287, 290–292).

Second, the Department says that only a few of these contracts were joint contracts or made for the benefit of all conference lines (Br. 37–39). We have shown (note 10 above) that its arithmetic is wrong. More basically, whatever the numerical count, the Alexander Committee in its summary recognized and described the joint contracts made for the account of all conference lines, and did so in terms *exactly* applicable to the present contract (4 Alex. Rept. 290).

Third, the Department of Justice suggests that perhaps the absence of a statutory prohibition of dual rate contracts reflected simply the fact that "the exclusive dealing arrangements were of such a wide variety and form that it would have been extremely difficult for Congress to have specified the particular ones to be outlawed." (D. J. Br. 41). This is an extraordinary contention. One does not ordinarily argue that a prohibition (penalized at $25,000 for each offense) is to be inferred because Congress might have found it too difficult to draft. And in any case, Congress had at hand a simple model which would reach every such contract. H. R. 4660, 62d Cong., 1st Sess., provided in Section 23 that it was

unlawful "to make a contract for the exclusive carriage of goods * * * conditioned partly on the shipment of such goods in the future by no other * * * lines of vessels."[13] It received no action.

Finally, the Department of Justice in its effort to explain the failure to forbid a dual rate system completes the case for the petitioners. It notes (D. J. Br. 41, fn. 19) that another reason for this failure may have been because there was no shipper complaint against this type of arrangement. Precisely so: without the period of deferment, the shipper retained his freedom if the non-conference opportunity was sufficiently attractive. It would not be necessary, as with deferred rebates, for the outside competitor to wait until the end of the year (or longer) when, according to an independent operator, "I noticed the people who had the least amount of rebate due, and gradually worked my way into them" (1 Alex. Rept. 141). The contrast between the two systems, as important in Singapore as in Washington,[14] was observed by the Committee (4 Alex. Rept. 307) and was quite evidently acted upon.

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[13] The full text is quoted in the Conference Brief (p. 76).

[14] Straits Settlement Ordinance No. XXVIII of 1910 imposed a 20% tax on every bill of lading and authorized the Governor in Council to exempt lines not parties to injurious agreements. The consular report to the Alexander Committee (3/215) explained that this Act was repealed when the steamship lines in negotiation with the Governor agreed to abandon the deferred feature, and to pay rebates at the end of the contractual period. See Ordinance No. XV of 1911. See, also, the Committee's frequent comments on the *non*-deferred but sliding rebate in the Bermuda and Caribbean trades (4 Alex. Rept. 219–223, 288, 292).

3. *The "First" Dual Rate Systems.* Isbrandtsen would have the Court erase this impressive evidence of widely used exclusive patronage contracts because, it says, they *first* came into use in 1922 and thereafter (Isb. Br. 119–121).[15] The Department of Justice lends footnote support to this contention (Br. 40).[16] As is so often the case, some history is necessary to reconcile technically correct statements with the obvious facts.

As indicated above, the contract rate system was in wide use just prior to World War I. During that war, all of the steamship conferences in the foreign trade of the United States suspended or disbanded.[17] Immediately after the war the rates in the foreign trade of the United States were set by the Shipping Board, which was initially the only operator in the trades, with the re-entering foreign-flag lines following its lead. But overtonnaging brought on a collapse of the rate structure in the Spring of 1920.[18] The Shipping Board accordingly in March 1920 organized its own "Conferences" of managing agents for the Fleet Corporation shipping lines.[19] The for-

[15] Isbrandtsen simply ignores the fact that the exclusive patronage contract condemned in *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41 (1922) was inaugurated in May 1919 (1 U. S. S. B. at 42).

[16] Its reliance is on *Marx*, International Shipping Cartels (1953) p. 210, who also explicitly recognizes that dual rate contracts were well known to the Alexander Committee and were not condemned by the Congress (pp. 56, 204, 218).

[17] Report of U. S. Delegates to Inter-American Maritime Conference (Govt. Printing Office, 1941) p. 147.

[18] Id. pp. 147–148.

[19] Fourth Annual Report of the U. S. Shipping Board (1919–1920), pp. 145–146.

eign-flag operators were shortly thereafter invited to participate, and "Ultimately these conferences were merged into the steamship conferences as they had existed before the World War." [20]

It is true that *these* conferences first initiated dual rates in the 1920's and 1930's. But the fact is quite irrelevant; the particular conferences were not in existence prior to the war.[21] The Maritime Administration document used by Isbrandtsen shows for example that the River Plate and Brazil Conference inaugurated dual rate contracts in 1930; this is correct, but the more informal conferences which in 1913 separately served (a) the River Plate and (b) Brazil exhibited to the Alexander Committee some 46 examples of dual rate contracts (*supra*, p. 12).

4. *The Claim of Committee Disapproval.* The respondents, after urging that there were no exclusive patronage contract systems in existence in 1913, proceed somewhat inconsistently to urge that these systems were disapproved by the Alexander Committee (Isb. Br. 113–18; D. J. Br. 41–49).

Isbrandtsen's affirmative argument for disapproval rests solely upon paragraph (4) of the Committee's recommendations. This paragraph, which is the gen-

[20] Report of U. S. Delegates to Inter-American Maritime Conference (Govt. Printing Office, 1941) p. 149.

[21] Any exception may be the North Atlantic Westbound Freight Association; the agreement of which as approved by the Shipping Board (No. 6) was said to have been made in 1910, when as the Liverpool/New York conference it was one of the 4 separate port conferences serving the United Kingdom to North Atlantic trade. There was in any case no contract rate system in this trade before World War I. (4 Alex. Rept. 54, 65.)

esis for Section 14, Fourth, is separated from paragraph (6) containing the "retaliation" recommendation; it reads (4 Alex. Rept. 421)—

> (4) That *rebating* of freight rates to shippers be made illegal; and that, with due regard to the proper loading of the vessel and the tonnage available, *discrimination* between shippers, or ports, in the matter of rates and space accommodations be prohibited. In this connection it is the belief of the committee that water carriers should be required to charge equal rates to all shippers, irrespective of the volume of freight offered for shipment. [Emphasis added.]

But neither the Alexander Committee nor its witnesses used the italicized words in a sense which would include a dual rate system which did not discriminate among the shippers to whom the contract was offered.

"Rebate" was used to describe a secret or discriminating favor granted one or a few shippers.[22] Significantly, the term was used by the Committee in contexts which necessarily excluded the dual rate contracts: It said of the Australian trade, "Contracts with shippers are made, but all the lines have stated to the Committee that there are no rebates, deferred or otherwise, in the trade * * *." (4 Alex. Rept. 105). In the Asiatic trade, the Committee said,

[22] *Committee:* 1/135; 2/1400; 4/115, 116, 313–14: *Witness:* 1/440, 632, 2/967, 967, 1317; 3/212, 213, 214, 234, 287–88.

We note, though citations would be supererogative, that (a) the term was most frequently used in a context which showed its employment as short-hand for deferred rebate, and (b) it was also frequently employed, as in the paragraph at issue, where its meaning cannot be derived from the immediate context.

"None of the contracts with shippers, most of which are joint contracts, it was testified (Vol. 1, p. 390) give special rates or rebates to some shippers which are denied to others." (4 Alex. Rept. 116). A witness explained that "we have special contracts with shippers, but no system of rebates" (1 Alex. Rept. 632). We have found no instance where the context shows that either the Committee or its witnesses equated "rebate" with the contract rate system.

The term "discrimination" was used by the Committee or its members in a considerable variety of senses. Where the context shows the sense, it meant to them (a) favoring the large shipper over the small;[23] (b) secret rebates;[24] (c) rates favoring exporters of another country;[25] or (3) denial of space or discharge facilities.[26] We have found no passage where the context showed the Committee, any of its members, or any of its witnesses to be using the term in connection with the exclusive patronage contracts. To the contrary, one witness in describing his exclusive patronage contracts said, "We would give anybody else the same rate on a similar contract; no discrimination whatsoever," and the Chairman pursued him only to ensure that the contract was in fact available to all (1 Alex. Rept. 203). The Chairman asked another witness, in connection with his shipper contracts, "whether or not you give to the large shippers and the small shippers the same rate; in other words

[23] 1/203, 446, 490; 2/767, 768, 876, 918, 920, 1026, 1103, 1192, 1401, 1408; 4/161, 236, 307.

[24] 1/135, 625; 2/1399; 4/216–17, 236, 300, 313, 416.

[25] 1/207–208, 627–28; 2/896, 897–98, 1128, 1263; 4/168.

[26] 1/53, 56, 116, 121, 125; 4/313.

is there a discrimination between large shippers and small shippers in the rate given them?" (1 Alex. Rept. 446). He asked a third if compulsory filing should include "contracts with shippers," and in the next question went on to ask if "it would be fair also if the law provided they should not discriminate between shippers?" (2 Alex. Rept. 1255).

The Department of Justice, in contrast to Isbrandtsen, does not seem to rely very heavily upon the Committee's Recommendation (4) (though see Br. 26), but rather to rest upon an asserted equivalence between the deferred rebate and the exclusive patronage contract (D. J. Br. 41–49). Its argument rests on three quotations from the Alexander Committee. Each, even as quoted in the Department's brief, shows that the Committee made consistent distinction between the two: the salient vice of the deferred rebate was its deferment (*id.*, p. 42); the shipper is tied by fear of "forfeiture of all accumulated rebates" (*id.*, p. 42); and it was particularly effective because "the shipper would not only forfeit his rebates but could be penalized by being denied accommodations for future shipments even at the full rates" (*id.*, p. 43).[27]

5. The "*Argued*" *Distinction.* Both Isbrandtsen (Br. 116–118) and the Department of Justice (Br. 41–42, 60) urge that the Court must disregard the Commit-

[27] The Department's readiness to equate the contract rate with the deferred rebate system may rest in part upon a misunderstanding of the latter. Section 14, First, of the Act is sufficient demonstration that the deferred rebate is not payable for exclusive patronage "during the contract period" but that exclusive patronage is requisite *also* during the "time after expiration of the contract" and prior to payment (see D. J. Br. 41).

tee's clear distinction between the deferred rebate and "the ordinary contract system" (4 Alex. Rept. 307):

> By deferring the payment of the rebate until three or six months following the period to which the rebate applies ship owners effectively tie the merchants to a group of lines for successive periods. In this connection *it is argued* that the *ordinary contract system* does not place the shipper in the position of continual dependence that results from the deferred rebate system. [Emphasis added.]

The word "argued," they say, means that this was merely a summary of witness testimony, not the Committee's own view.[28]

Their insistence is somewhat remarkable, since they (D. J. Br. 42; Isb. Br. 132–136, as Judge Washington below, R. 246) are forced to the position that this Court, writing through then Justice Stone, was similarly misled in *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 307. This Court's summary of the Alexander Report may not have been necessary to its decision, and indubitably was in footnote rather than double-lead text. We believe, nevertheless, that there is some presumption against an argument which proceeds to the conclusion that Justice Stone was incapable of reading a legislative report.

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[28] Isbrandtsen (Br. 117) seeks to reinforce its point by misquoting a footnote which in fact refers to an *earlier and different* summary as representing "the views of leading exporting and importing firms" (4 Alex. Rept. 295). In the next sentence it converts "the advantages * * * as presented to the Committee" into "the *arguments* 'presented to the Committee' ", supplying both its own words and its own italics.

We have already shown that the Committee nowhere suggested that it had any objection of its own to the contract rate system (Br. 35-42). It should also be noted that of the 55 witnesses who testified before the Committee *not one* opposed the contract rate system which, like the one involved here, was open to all shippers. Of the 279 shippers who responded to a circular letter of the Committee, there was only 1 who was opposed to a contract rate-system which was open to all (2 Alex. Rept. 1398, 1405) and even his complaint seems to have been grouped by the Committee with the objections to quantity discount (*id.*, 1404). The Department of Justice itself notes the absence of complaint against the system (D. J. Br. 41). A summary of an unopposed "argument" is not much different from a categorical statement.

In fact, the verb "argued" simply reflects a rhetorical device frequently employed by the Committee draftsman. In the 12-page summary of advantages and disadvantages of the conference system, he employed similar terms on 13 other occasions, and in virtually every case to make a point with which the Committee was demonstrably in agreement.[29]

[29] (a) It was "contended" that the conference system was necessary to regular service (p. 295), that it offered protection to both shippers and carriers (p. 295), and that in general the U. S. export rates were in line with the European (p. 301). (b) It was "claimed" that the security to steamship investment resulted in better service (p. 297). (c) It was "asserted" that rate wars were harmful (pp. 297, 298, 298), that shippers obtained better service from liners than tramps (p. 300), that pooling permitted service to minor ports (p. 303), and that conferences are able to fix rates arbitrarily (p. 305). (d) it was "regarded" that unrestrained competition was demoralizing

Beyond all this, whether the Committee was summarizing a contention or its own views, the fact remains that in summarizing the "Disadvantages of Shipping Conferences and Agreements, as Now Conducted" (4 Alex. Rept. 304), the Committee considered that the one point of immediate relevance to the deferred rebate system was deferring its payment for 3–6 months after the contract period (*id.*, p. 307), and considered it relevant also to point out in the next sentence, that "it is argued that the ordinary contract system" was different.

III. COURT AND AGENCY DECISIONS HOLD THAT THE SYSTEM IS NOT ILLEGAL PER SE

There is no occasion to reargue the decisions of this Court, in the interpretation of which the Court needs no assistance from us. But we believe it *is* necessary to eliminate the confusion created by the respondents (D. J. Br. 50–55; Isb. Br. 139–147) as to the agency decisions of the Board and its predecessors.

1. *Sec. 14, Third.* There is not the slightest inconsistency, in decision or in language, in the agency's interpretation of Section 14, Third. In 1922, in the first case to present the issue, it said of the dual rate

(p. 300). (e) it was "argued" that conference lines had a virtual monopoly of some trades (p. 306), as well as that contract rate systems were better than deferred rebates (p. 307). (f) Finally, "according to" some, unrestrained competition led to consolidation of lines (p. 301).

The second paragraph of the Committee's recommendations three times uses the verb "claimed" to describe the advantages of conferences and then continues in the next sentence: "These advantages, the Committee believes, can be secured only by" sanctioning conferences subject to Government supervision (4 Alex. Rept. 416).

contract that there was no evidence "tending to show direct or indirect retaliation against the complainants for patronizing other carriers. * * * That part of the complaint alleging violations by the carrier of paragraphs 3 and 4 of section 14 of the act is, therefore, without support." *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41, 46.[39] From 1922 down to 1957 this decision has been followed without the slightest deviation (F. M. B. Br. 71–73).

2. *Secs. 15–17.* It is not surprising that there should be less than perfect consistency in applying the broad and general standards of "unjustly discriminatory or unfair" (Sec. 15), "undue or unreasonable prejudice or disadvantage" (Sec. 16, First) and "unjustly discriminatory" rate (Sec. 17). No agency, and possibly no court, can claim 40 years of undeviating movement across fields so broad as these.

Specifically, in two cases the Shipping Board used broad language which, isolated from the facts of the cases and from other passages in the same opinion, pointed to a view that *any* dual rate contract would be unjustly discriminatory. *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41, 44–46 (1922); *Intercoastal Investigation, 1935*, 1 U. S. S. B. B. 400, 451–52. The *Eden* contract clearly merited condemnation as "unjust": a single carrier was in-

[39] We have no idea why Isbrandtsen insists that the Board first passed on Sec. 14, Third, in 1948 (Isb. Br. 93, 140). As for the Department of Justice, its anxiety to dismiss the *Eden* holding leads it into contradiction of its main argument, for if *evidence* of retaliation is necessary (D. J. Br. 52, n. 28) before a dual rate contract is invalid, it is not invalid on its face and the decision below must be reversed.

volved,[31] the contracts ran for 3 years, and 2-way exclusive patronage was required for a 1-way discount. See *Rawleigh* v. *Stoomvaart et al.*, 1 U. S. S. B. 285, 290 (1933). The *Intercoastal* case specifically recognized that, before the 1933 grant of power to regulate intercoastal rates, "the contract rate system served a useful purpose" (1 U. S. S. B. B. at 454) and on review the Secretary took pains to make plain that the decision was inapplicable to the "circumstances attending transportation in foreign commerce" (1 U. S. S. B. B. at 467).

Apart from some of the language in these two cases, each of which presented facts calling for the Board's condemnation, the agency opinions and decisions under Sections 15–17 have been wholly consistent[32] (F. M. B. Br. 71–73). It would be extraordinary indeed if the Board's consistent decisions under Section 14, Third, were to be dismissed as inconsistent and unreliable because some of its language, but not its decisions, in two cases under Secs. 15–17 was overbroad as measured by subsequent cases. The field of ocean shipping, of all regulated activities, should not be dis-

[31] The Department of Justice, in asserting that concerted activities are worse than those of a single line (Br. 53) shows again more attachment to the theoretical law of restraints of trade than to the realities of ocean transport. Obviously, a multi-line contract system gives the shipper the choice of services, while under a single line contract he has no choice.

[32] The Department of Justice manufactures an inconsistency (Br. 34, 54) by reading *Contract Routing Restrictions*, 2 U. S. M. C. 226–227 (1939) as disapproving the dual rate system. In fact not the contract rate system but only one provision (forbidding use of direct service from the Great Lakes) was disapproved (p. 227).

rupted because the regulatory agency is staffed by men and not by angels and has, years ago, on a different issue, used words too broad to be applied in subsequent cases.

IV. THE DUAL RATE SYSTEM IS NOT UNJUSTLY DISCRIMINATORY

Isbrandtsen, but not the Department of Justice, argued to the court below that the dual rate system of this Conference could not be approved because it was "unjustly discriminatory" under Sections 15 and 17 of the Act and gave an "undue or unreasonable preference or advantage" under Section 16 of the Act. The court below expressly ruled (R. 243):

> Whether or not these characteristics exist depends upon the facts and circumstances of the case as found by the Board; and the courts will not substitute their judgment in this regard for that of the Board.

Isbrandtsen renews its contentions before this Court (Isb. Br. 148–155). The Department of Justice, apparently no longer completely content to rest upon Section 14, Third, alone, offers a lengthy footnote in support of this contention (D. J. Br. 29–30). Neither respondent argues that, if the Board has power to approve, the power was unlawfully exercised on the facts of this case. The report of the Board (R. 23–37, 60–69) shows that no such contention could reasonably be made. The issue presented by the respondents comes down, then, to the simple question as to whether every dual rate system, in any circumstances, is necessarily and *per se* unlawful under Sections 15–17 of

the Act. Along with that issue, we feel the Court
entitled to an explanation of the Board's policy wit
respect to the existing but unapproved dual ra
systems.

A. SECTION 17 DOES NOT MAKE DUAL RATE CONTRACTS UNLAWFU
PER SE

Isbrandtsen explicitly bases its argument on th
proposition that "Section 17 of the Shipping Act i
this respect has its immediate origin in and bears clos
resemblance to section 2 of the Interstate Commerc
Act" (Isb. Br. 148), and the Department of Justice o
the ground that "Section 17 * * * parallels the pro
hibition on 'unjust discrimination' in Section 2 o
the Interstate Commerce Act" (D. J. Br. 29). Ever
one of the cases cited (Isb. Br. 150–151), except fo
four of no discernible relevance,[33] rests exclusively
on Section 2 of the Interstate Commerce Act. *Wigh*
v. *United States*, 167 U. S. 512, 518; *Int. Comm*
Comm. v. *Del. & L. & W. R. R.*, 220 U. S. 235, 252-
254; *Int. Com. Comm.* v. *Balt. & Ohio R. R.*, 225 U. S

[33] *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467, an
Chi., Ind. & L. Ry. Co. v. *United States*, 219 U. S. 486, held
that free passes could not be issued in settlement of claims o
in payment of advertising; they rested on that part of Sec
tion 6 (7) of the Interstate Commerce Act forbidding "
greater or less *or different* compensation," which is not foun
in the Shipping Act. *United States* v. *Illinois Central R. R.*
263 U. S. 515, upheld an I. C. C. determination that it wa
unjustly discriminatory to give preferred lumber rates t
communities which could reach the market over other lines
Fourche R. R. Co. v. *Bryant Lumber Co.*, 230 U. S. 316, held
that the prohibition against rebates forbade freight rebates i
payment for land purchased.

326, 342; *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57, 62.

The early drafts of the Shipping Act carried over Section 2 of the Interstate Commerce Act in only slightly rephrased form, H. R. 17328, 63d Cong., and H. R. 450 and 14377, 64th Cong. each provided in Section 4, First, that it was unlawful—

> *First:* To charge, demand, collect, or receive from any person or persons by any special rate, rebate, drawback, or other device a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of this act than it charges, demands, collects or receives from any other person or persons for doing for him or them a like service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

After hearings[34] in which this provision was heavily attacked, on the ground that it could not be applied to ocean transport (Hearings, pp. 44, 88, 127, 139–140, 173, 183), and only weakly defended (pp. 27–28), it was eliminated by the House Committee. With its elimination of Section 4, First, the Committee eliminated also the whole basis of respondents' argument.

B. THE UNAPPROVED DUAL RATE SYSTEMS

Isbrandtsen makes repetitive complaint that about 62 conferences are employing dual rate systems which have not specifically been approved by the Board (Isb.

[34] Hearings Before House Committee on Merchant Marine and Fisheries on H. R. 14377, 64th Cong., 1st Sess., Apr. 13–22, 1916.

Br. 10–11, 55–56, 63, 79–84).[35] We by no means agree that there are 62 unapproved systems; the count could be made only after detailed investigation of the file and proceedings in connection with each conference. But in any case this aspect of the dual rate problems quite obviously has nothing to do with the issues of this case. We consider, however, that the Court might more satisfactorily put the issue to one side if it were aided by a sober statement as to its nature.

The Board and its predecessors have in the past not required special approval as a prerequisite to the inauguration of dual rate systems under Section 15 in the view that these were subsidiary to the basic agreements. See *Section 15 Inquiry*, 1 U. S. S. B. 121 (1927).

The decision in *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883 (S. D. N. Y., 1951), aff'd by equally divided Court; 342 U. S. 950 (1952), indicated, however, that a dual rate system might be invalid because of an unreasonable differential between the two rates. Also, the Board was at about this same time in the course of evolving a series of rather exacting standards under which some dual rate systems would be

[35] Isbrandtsen again misquotes (this time at Isb. Br. 141) the monograph of the Attorney General's Committee on Administrative Procedure (1940), and the Board must again supply the omitted words, in the Committee's observation on the predecessors of the present Board that—

"Despite the comprehensive regulatory powers conferred upon the Shipping Board by the act of 1916, the Board (*as distinguished from its successor, the present Commission*) throughout its existence failed to interest itself in the vigorous exercise of those powers."

approved and others would not (see F. M. B. Br. 71–73).

Accordingly the Board in November 1952 promulgated General Order 76 (46 C. F. R. Sec. 236) which required broadly that all conferences then using, or proposing to inaugurate, contract rate systems, or to increase the rate differential of an existing system, file the contract form and statements showing (a) the reasons for using the system, (b) the amount of the differential, (c) the reasons for that amount. The respondent Conference's filing under G. O. 76 is shown in the record (R. 153–82). With this information on file, the Board had the basic data with which to examine each of the contract rate systems then in effect.

In 1954, in *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (C. A. D. C. 1954); cert. den., 347 U. S. 990, the courts for the first time held that specific Board approval is necessary for each contract rate system. See also *River Plate & Brazil Conf.* v. *Pressed Steel Car Co.*, 124 F. Supp. 88 (S. D. N. Y., 1954), aff'd 227 F. 2d 60 (C. A. 2, 1955); *Pacific Westbound Conf.* v. *Leval & Co.*, 208 Ore. 390, 269 Pac. 2d 541 (1954), cert. den., 348 U. S. 897.

There has, however, throughout this period been a vigorous campaign by the Department of Justice and Isbrandtsen Co. to have the dual rate system declared invalid *per se*. Its outcome will turn upon the decision of the Court in this case. The Board has not considered it either prudent or possible to undertake a wholesale investigation on its own motion into each of the trades using the contract rate system until the threshold issue of validity *per se* has been settled. It

would require an exceedingly large investment of the Board's manpower, and would unsettle many stable trades, when possibly the whole inquiry would, in the event of an adverse decision by this Court, be bootless.

The Board, while temporarily leaving the status quo unchanged, has required that all new contract rate systems be specifically approved[36] before their inauguration. *Contract Rates—North Atlantic Cont'l. Frt. Conf.*, 4 F. M. B. 98, 102, 105–106 (1952). The Board in addition has entertained all complaints by parties in interest against dual rate systems and has set them for hearing.

In the event the Court should reverse the court below, as the Board is confident it must, then the Board will inaugurate procedures by which each of the contract rate systems now in operation, and not heretofore approved, will be subjected to the Board's examination and in consequence either approved or disapproved. It has considered it wiser to await such guidance as may be derived from the opinion of this Court before crystallizing the precise procedure by which this formidable task will be undertaken.

V. THE BOARD IS NOT BARRED FROM APPROVING AGREEMENTS RELATING TO SHIPPER CONTRACTS

Isbrandtsen urges (Br. 155–157), without support from the Department of Justice, that the Board cannot approve a contract rate system because such a

[36] Or, prior to *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (C. A. D. C.), cert. den., 347 U. S. 990, that they be set for hearing as to their validity.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~739~~ 973

FEDERAL MARITIME BOARD, *Petitioner,*

v.

ISBRANDTSEN COMPANY, INC., UNITED STATES OF AMERICA and SECRETARY OF AGRICULTURE, *Respondents.*

No. ~~740~~ 974

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, *et al.*, *Petitioner,*

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC. and EZRA TAFT BENSON, SECRETARY OF AGRICULTURE, *Respondents.*

BRIEF OF RESPONDENT ISBRANDTSEN COMPANY IN RESPONSE TO PETITIONS FOR WRITS OF CERTIORARI AND REQUESTING THAT THE JUDGMENT OF THE COURT OF APPEALS BE AFFIRMED.

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system involves contracts with shippers who are not carriers by water, while Section 15 relates only to contracts between carriers by water. The argument does not merit serious attention.

Section 15 very clearly contemplates that approved agreements may be effectuated by separate contracts or agreements with shippers. An agreement "fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations or other special privileges or advantages" can only be carried out by means of separate agreements with shippers in which the rates, fares, accommodations, privileges, or advantages are actually put into effect. Without such separate agreements with shippers the agreement by the common carriers could have no practical effect.

If anything has been settled in this much-litigated field, it is that conference agreements to institute the dual-rate system by contracts with shippers are subject to the jurisdiction of the Board under Section 15. *Far East Conference* v. *United States*, 342 U. S. 570; *U. S. Navigation Co.* v. *Cunard*, 284 U. S. 474; *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (C. A. D. C., 1954), cert. den., 347 U. S. 990.

Isbrandtsen's final argument, that the Board cannot grant such approval because Section 15 would thereby be rendered unconstitutional, as an unlawful delegation of legislative authority and as a violation of the Fifth Amendment (Isb. Br. 157–162) does not in our view call for reply.

CONCLUSION

For the reasons advanced in our main brief and herein, the judgment of the court below should be reversed.

Respectfully submitted.

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NOVEMBER 4, 1957.

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